

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRENDA J. FUNK

Claimant

VS.

SABETHA COUNTRY INN

Respondent

AND

FIRSTCOMP INSURANCE COMPANY

Insurance Carrier

Docket No. 1,035,446

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the December 3, 2008, Preliminary Hearing Order entered by Administrative Law Judge Rebecca Sanders. Timothy J. Pringle, of Topeka, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant continued to have knee problems after her surgery to repair an injury suffered in a work-related accident on February 16, 2007. The ALJ, therefore, found that claimant's current knee condition is a natural and probable consequence of the February 16, 2007, injury, notwithstanding an intervening injury on or about August 31, 2007, and ordered respondent to provide her with medical treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 3, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends that claimant's injuries from her original injury of February 16, 2007, had healed when claimant suffered an intervening injury on or about August 31, 2007. Therefore, respondent contends that claimant's current need for medical treatment

was the result of the intervening injury and not the result of personal injury by accident that arose out of and in the course of her employment. Accordingly, respondent requests that the Board reverse the Preliminary Hearing Order of the ALJ.

Claimant asserts that her knee condition remained symptomatic and the worsening of her condition after the intervening injury of August 2007 is a natural and probable consequence of the February 16, 2007, work-related injury. She requests that the Board affirm the Preliminary Hearing Order of the ALJ.

The issue for the Board's review is: Is claimant's current knee condition a natural and probable consequence of the original work-related injury or does the intervening injury of August 2007 relieve respondent of its obligation to provide medical treatment?

FINDINGS OF FACT

Claimant was employed as a desk clerk at respondent. On February 16, 2007, she slipped and fell while walking on some ice. She was seen the next day at the emergency room of Sabetha Community Hospital and diagnosed with right knee strain with joint effusion. She continued to have problems, and in March 2007 she was referred to Dr. Brett Miller by her personal physician, Dr. Steffan Shamburg. Dr. Miller reviewed an MRI taken of her right knee and diagnosed her with a torn anterior cruciate ligament (ACL) and medial meniscus. He performed surgery on claimant's knee on April 2, 2007.

After surgery, claimant continued to be treated by Dr. Miller. On April 23, 2007, she began post-surgery physical therapy in Sabetha. By May 8 she reported her pain level was a 0 and no edema was noted by the therapist. Claimant, however, reported that her knee was still unstable. She returned to therapy on May 15 but was not feeling well and had no treatment. She reported her pain level on May 15 to be 0. Claimant cancelled her appointment for May 17.

Claimant saw Dr. Miller for a follow-up of her ACL reconstruction on May 18, 2007. At that time she told Dr. Miller that she was essentially pain free. Her range of motion was 0 degrees to 120 degrees. Dr. Miller took her off crutches and released her to full duty for clerical work. He continued her physical therapy, but claimant failed to return to her physical therapy and the sessions were discontinued. She testified that she stopped going to the physical therapy sessions in Sabetha because she had moved to Topeka. In August 2007, claimant obtained authorization from respondent to receive physical therapy in Topeka.

Claimant returned to Dr. Miller's office on July 27, 2007, and was seen by Cory Schrick, a physician's assistant. Claimant reported to Mr. Schrick that she had mild pain in the posterior aspect of her knee. Examination of the knee showed a mild effusion but no redness, erythema, or warmth. She had mild tenderness over her hamstring tendons

in the posterior of her leg. Mr. Schrick told claimant that she may have been overdoing and suggested she wear her brace, rest and ice her knee, and take Ibuprofen as needed.

Claimant testified that on or about August 31, 2007, she was walking through a chicken pen when a chicken ran between her legs. As she started to step over the chicken, she fell and reinjured her right knee. She had an MRI that showed she may have re-torn her ACL and further damaged her medial meniscus.

Claimant was seen again by Mr. Schrick on September 4, 2007, where she reported the incident with the chicken. She complained of increased pain and occasional instability in her right knee, and said the pain seemed to radiate into her thigh. She was again sent to physical therapy. A new MRI showed a "degenerated and likely partially torn ACL reconstruction graft."¹

On October 31, 2007, claimant reported that she had been standing at her sink at home the day before when her right knee popped out, resulting in severe pain. She was seen by Dr. Miller on November 2, 2007, and again on November 30, 2007, at which times he found her right knee to be unstable. He recommended revision ACL reconstruction.

At the request of claimant's attorney, she was seen on September 17, 2008, by Dr. Edward Prostic. Claimant told Dr. Prostic about her original injury in February 2007 and about the incident when she tripped over a chicken. She told him that she had physical therapy post-operatively but was having limited progress. After examination, Dr. Prostic commented that claimant had a poor response to her surgery and was continuing to have difficulties with her knee before the incident with the chicken. He opined that the incident with the chicken "could have caused tearing of the graft but the overall condition of the knee is judged to be the natural and probable consequence of the February, 2007 accident."²

Claimant was next seen by Dr. Daniel Zimmerman at the request of respondent. After evaluating claimant and reviewing her medical records, Dr. Zimmerman stated:

It is medically clear that the event described in the progress note dated September 4, 2007 by Cory J. Schrick, P.A.-C (which is clearly not work related) is the proximate and prevailing factor that has caused a recommendation for another right knee operative procedure by Brett A. Miller, M.D.³

¹ P.H. Trans., Cl. Ex. 5 at 1.

² P.H. Trans., Cl. Ex. 5 at 3.

³ P.H. Trans., Resp. Ex. 1 at 1.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,⁴ the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*,⁵ the court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*,⁶ the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an

⁴ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

⁵ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

⁶ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*,⁷ the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was “a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back.”⁸

In *Logsdon*,⁹ the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

Whether an injury is a natural and probable result of previous injuries is generally a fact question.

When a primary injury under the Worker’s Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

When a claimant’s prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

Finally, in *Casco*,¹⁰ the Kansas Supreme Court states: “When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury.”

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a

⁷ *Graber v. Crossroads Cooperative Ass’n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

⁸ *Id.* at 728.

⁹ *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

¹⁰ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

¹¹ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹²

ANALYSIS

The compensability of claimant's current knee problems and need for treatment turns on whether her original injury had fully healed before the tripping incident in August 2007. Stated another way, would the injury claimant suffered in August 2007 have occurred from that accident but for the preexisting condition in her right knee?

Claimant contends that her knee was still symptomatic and that her surgically reconstructed knee had not fully healed when the incident of August 2007 occurred. Although claimant had stopped going to physical therapy in Sabetha, respondent had agreed to authorize physical therapy in Topeka shortly before the August 2007 incident. But claimant had been released to return to work. She had not, however, been released from medical treatment. Claimant did not report any weakness or instability in her knee as causing or contributing to her fall on August 2007. And she had been relatively pain free up until that point. Nevertheless, claimant had sought additional treatment shortly before this August 2007 incident and the injuries claimant suffered when she tripped over the chicken appear to have been to the same parts of the knee that had been injured previously.

Claimant's medical expert, Dr. Prostic, described the August 2007 aggravation as a natural and probable consequence of the original work-related injury and resulting ACL reconstruction surgery. Respondent's expert, Dr. Zimmerman, relates claimant's present need for treatment to the August 2007 incident. It is unfortunate that the record does not contain an opinion from the physician that performed claimant's initial knee surgery, Dr. Miller.

Given the relatively recent surgery, April 2007, and the fact that claimant had not yet been released by the treating physician at the time of the subsequent August 2007 incident, this Board Member finds that the injury that resulted from the August 2007 incident would not have occurred but for the preexisting condition. Claimant's current knee condition and need for medical treatment is a direct and natural consequence of the work related injury.

¹² K.S.A. 2008 Supp. 44-555c(k).

CONCLUSION

Respondent is responsible for claimant's current knee injury because it resulted from and occurred as a natural and probable consequence of the original work-related injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca Sanders dated December 3, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2009.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Timothy J. Pringle, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge